IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02/04/2004

CORAM

THE HONOURABLE MR. JUSTICE A.S. VENKATACHALAMOORTHY
AND
THE HONOURABLE MR. JUSTICE P.K. MISRA

TAX CASE No.334 of 2001
and TAX CASE NOs. 335 and 336 of 2001

The Commissioner of Income-tax,
Coimbatore. .. Applicant in all cases

-Vs-

M/s. Vijay Granites P. Ltd.,
Anuparpalayam, Tiruppur. .. Respondent in all cases

Tax Case Reference arising out of I.T.A.Nos.3946/Mds/89 and 3147 & 3 148/Mds/90 for the assessment years 1986-87 to 1988-89 at the instance of the Revenue.

!For Applicant : Mr.K. Subramanian
Senior Standing Counsel(Tax)

For Respondent : Mr.P.P.S. Janarthana Raja

:J U D G M E N T

P.K. MISRA, J.
The following questions have been referred to under Section 256(1) of the Income-tax Act, 1961 to the High Court :-

 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in upholding the finding of the CIT (Appeals) that the assessee was eligible for deduction under section 32A of the Income-tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in upholding the order of the CIT (Appeals) reversing the order of the assessing officer that the cranes were to be treated as transport vehicles and not plant and machinery eligible for deduction under Section 32A ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in upholding the order of the CIT (Appeals) reversing the order of the Assessing Officer that the assessee company was not eligible for deduction under section 80-I of the Income-tax Act ?

2. The facts giving rise to the aforesaid reference are as follows :-

The Assessee is a company engaged in the business of raising granites from mines, polishing them and exporting them outside India. The assessee apart from doing mining also purchases granite blocks and after subjecting granite blocks to further processing, exports the polished granites. For the assessment years 1986-87 and 1987-88, the assessee claimed investment allowance in respect of cranes and in respect of assessment year 1988-89, the company claimed allowance under Section 32AB of the Income Tax Act (hereinafter referred to as the Act). The Assessing Officer disallowed the claim, firstly on the ground that cranes were transport vehicles and further on the ground that no manufacturing process was involved in cutting of the granites and polishing them. On appeal, the appellate authority accepted the contention of the assessee to the effect that the machinery was not a transport vehicle and the assessee was engaged in the manufacture or production of articles and was therefore entitled to deduction. On further appeal by the Department, the Appellate Tribunal confirmed the aforesaid conclusions. On the basis of the application filed under Section 256(1) of the Act, the questions already indicated have been referred to the High Court.

3. For applicability of Section 32A, it is required that the machinery or the plant should have been installed for the purpose of manufacture or production of any article or thing. Similarly for claiming deduction under section 80-I, it is necessary that the industrial undertaking should manufacture or produce any article or thing.

4. Learned counsel appearing for the Department has submitted that merely by subjecting the granites to the process of cutting and even polishing would not amount to manufacturing or producing any article or thing. Learned counsel appearing partment has placed reliance upon the decision of this Court reported in 246 ITR 737 (COMMISSIONER OF INCOME-TAX v. GOMATESH GRANITES). In the said decision, the question referred to the High Court was as to whether the activity in extracting granite from the hills and processing it by cutting rough edges before export amounted to manufacture or production of articles or things. After referring to several decisions of the Supreme Court and different High Courts, a Division Bench of this Court observed :
 . . . The benefit under sections 80J and 80HH of the Income-tax Act can be availed of only if the assessee is able to prove that it is engaged either in the manufacture or in the production of articles. Extraction of granite cannot be regarded as the result of any manufacturing activity. Manufacturing implies subjecting the raw material or other ingredients that go into the making of the final product to a series of processes as a result of which the input undergoes changes at different stages and ultimately emerges as a product with a distinct commercial identity of its own, and becoming

capable of use for the purposes to which the inputs which went into the making of the product by themselves could not have been as effectively used. Blasting of a granite block which is found on a natural formation involves only a process of cutting or removing part of a larger mass, and that activity of removing a part from the larger block or hill, though it involves skill, labour and effort and perhaps use of machinery as well, is not an activity which can properly be regarded as manufacture, even after the widest possible meaning is ascribed to that term. The granite hills are a natural bounty and merely removing a portion of it does not involve a process of manufacture. It is more properly to be regarded as mining. . . .

It was further held as follows :-
 . . . The process involved in the work carried out by the assessee has already been set out. It does not indicate the existence of process involving any complexity or the transformation of what was already embedded in the larger mass into something new and different after the completion of the process. The granite block which is cut from the larger formation continues to remain granite only. The fact that labour and skill is required to remove the block from the larger mass by itself, cannot be regarded as amounting to production. Transporting the same cannot be regarded as production. Cutting a larger mass of granite with a view to obtain a block of granite which without any further process of any significance-the only thing done by the assessee herein being just washing the block and cutting rough edgesalso cannot be regarded as a process of production.
. . .
 The test is not merely as to whether the thing in question has a market. It is also necessary to establish that the thing in question is an article which is the result of the production or manufacture.

5. Apparently the aforesaid decision is applicable to the present case. However, the learned counsel for the assessee has submitted that in the aforesaid decision, the Division Bench was conscious of the fact that the process of polishing may bring it within the expression manufacture or production and as such the aforesaid decision is not applicable. It is of course true that in the aforesaid Division Bench decision it was observed :
 . . . This is not to say that the activity of cutting the extracted block to smaller sizes, polishing the same, and thereafter exporting the polished slabs, would not amount to production. It is not necessary for us to express any opinion finally on that question as that question does not arise for our consideration in these cases.
From the aforesaid observation, it is apparent that the question whether the act of polishing would bring it within the meaning of production has been left open.

6. Learned counsel for the Department has placed reliance upon the decision of the Supreme Court reported in 249 ITR 307 (COMMISSIONER OF INCOME-TAX v. GEM INDIA MANUFACTURING CO.) In the aforesaid decision, the question was as follows :-
 Whether, on the facts and in the circumstances of the case and in

law, the Tribunal was right of confirming the order of the Commissioner of Income-tax (Appeals) holding that the assessee, engaged in cutting and polishing of diamonds, amounts to manufacturing or production of goods and is entitled to deduction under section 80-I of the Income-tax Act, 1961 ?

The specific question, therefore, was whether the assessee in cutting and polishing diamonds amounts to manufacture or production of goods. The Tribunal had taken the view that the benefit of deduction under Section 80-I of the Act was available because in common parlance and commercial sense raw diamonds are not the same as the cut diamonds. The view of the Tribunal had been confirmed by the Bombay High Court. While allowing the appeal filed by the Department, the Supreme Court observed :
 . . . There can be little difficulty in holding that the raw and uncut diamond is subjected to a process of cutting and polishing which yields the polished diamond, but that is not to say that the polished diamond is a new article or thing which is the result of manufacture or production. There is no material on record upon which such a conclusion can be reached. The appeal is, therefore allowed. The order under challenge is set aside. The question quoted above is answered in the negative and in favour of the Revenue.

7. In 2003 (10) SCC 771 (COLLECTOR OF CENTRAL EXCISE, JAIPUR v. ASSOCIATED STONE INDUSTRIES (KOTA) LTD., KOTA, RAJASTHAN), the question was raised in the context of Section 2(f) and 3 of the Central Excise Act. The Supreme Court observed :
 . . . It cannot be held that cutting, edging, trimming, polishing and other processes on the marble slabs amount to a process of manufacture as it does not bring in a distinct product. (emphasis added)

8. In 262 ITR 417 (COMMISSIONER OF INCOME-TAX v. POOSHYA EXPORTS P. LTD.,), the assessee was a company doing business of mining and quarrying granite stones and exporting them as finished goods. Before exporting those granite stones as per the specification of the customers, the stone underwent various types of manual and machinery processes such as removal of over burden, location and drilling of the boulders, eschewing of waste, drilling of holes, lifting those granite blocks, dressing, shaping, sizing, colouring and giving uniform grains to those stones and the process also involved removing of certain natural flaws such as air-pores, veins, cracks, etc.. Certain chemical impurities were also required to be removed in special manufacturing process. In other words, the process included the process of cutting as well as polishing of granites. While considering the question whether the assessee was entitled for the relief under Section 32A of the Act, the Division Bench of this Court observed :-

 . . . As far as the first question is concerned, the counsel on either side accepted that the same has to be decided against the assessee and in favour of the Revenue in view of the judgments of this court in the case of CIT v. Gomatesh Granites (2000)246 ITR 737 and in case of CIT v. Bishal Enterprises (2001)247 ITR 484. Hence, the first question is answered in the

negative against the assessee and in favour of the Revenue.

It is of course true that the aforesaid observation was on the basis of concession of both sides. However, the concession appears to be well founded.

9. Learned counsel appearing for the assessee has however placed strong reliance upon the decision of the Karnataka High Court in 250 ITR 725 (COMMISSIONER OF INCOME-TAX v. MYSORE MINERALS LTD.) and the decision of the Supreme Court in 251 ITR 323 (ASPINWALL AND CO. LTD. v. COMMISSIONER OF INCOME-TAX). In 250 ITR 725, it was observed that extracting granite from quarry and cutting it to various sizes and polishing amounted to manufacture or production of any article or thing and the assessee is entitled to benefit under Sections 32A and 80-I of the Act. For the aforesaid purpose, the Karnataka High Court relied upon an earlier decision of the Karnataka High Court reported in 2 05 ITR 461 (COMMISSIONER OF INCOME-TAX v. MYSORE MINERALS LIMITED). The said decision in turn had relied upon an earlier decision of the Karnataka High Court in 189 ITR 463 (SHANKAR CONSTRUCTION CO. v. COMMISSIONER OF INCOME-TAX). Such earlier decision of the Karnataka High Court had been overruled by the Supreme Court in 204 ITR 412 (COMMISSIONER OF INCOME-TAX v. N.C. BUDHARAJA AND CO.). As a matter of fact, the Division Bench of this Court in 246 ITR 737 (cited supra) had taken into account the decision of the Karnataka High Court in 205 ITR 461 (cited supra) and had not agreed with such conclusion.

10. Learned counsel appearing for the assessee has placed strong reliance upon the decision of the Supreme Court reported in 251 ITR 323 (cited supra). In the said case, the question was whether the assessee's activity of curing coffee amounts to manufacturing, entitling the assessee to the benefit under Section 32A of the Act. The Tribunal had come to the conclusion that the following nine process are involved in curing of coffee :-
(1) Receipt of coffee from the estates;
(2) Storage of coffee in covered godowns;
(3)Drying of coffee the required standards prescribed by the coffee board in drying yards;
(4) Hulling/pealing/polishing;
(5) Grading of coffee mechanically;
(6) Colour sorting;
(7) Garbling and manual grading;
(8) Out-turning of garbled coffee; and
(9) Bulking.

The High Court had accepted the factual position, but came to the conclusion that the processes did not show any kind of change or commercially a different commodity. While reversing the decision of the High Court, the Supreme Court observed as follows :-
" . . . The word "manufacture" has not been defined in the Act. In the absence of a definition of the word "manufacture" it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and

different article then it would amount to a manufacturing activity.

. . . .

 Adverting to the facts of the present case, the assessee after plucking or receiving the raw coffee berries makes it undergo nine processes to give it the shape of coffee beans. The net product is absolutely different and separate from the input. The change made in the article results in a new and different article which is recognised in the trade as a new and distinct commodity. The coffee beans have an independent identity distinct from the raw material from which it was manufactured. A distinct change comes about in the finished product.

11. Even though such decision may prima facie appear to be in support of the contention of the learned counsel for the assessee, on closer scrutiny, we are of the opinion that such decision is not applicable to the facts and circumstances of the present case. As a matter of fact, the aforesaid decision has been distinguished subsequently by the Supreme Court in 255 ITR 178 (SACS EAGLES CHICORY v. COMMISSIONER OF INCOME-TAX).

12. In view of the aforesaid discussion, we come to the conclusion that in the facts and circumstances of the case, the act of cutting and polishing granite slabs before exporting them did not involve any process of manufacture or production to entitle the assessee the benefit under Section 32A or 80-I. In view of the aforesaid conclusion, it is not necessary to consider as to whether the machinery purchased by the assessee was a transport vehicle or not.

13. For the aforesaid reasons, three questions are decided in the negative in favour of the Department and against the assessee.

Index : Yes
Internet: Yes

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To
M/s. Vijay Granites P. Ltd.,
Anuparpalayam, Tiruppur.